MID-LIFE CRISIS

Australian community legal centres

Mary Anne Noone

For independent centres the struggle to be born has turned into the struggle for survival...If ever they lose their sense of political purpose and their innovative tendencies they will die and probably deserve to. But I see no signs of senility yet.

John Basten[1]

Can Australian community legal centres survive 1990s neo-conservatism?

Australian Community Legal Centres (CLCs) are facing a mid-life crisis. This is reflected in several recent developments discussed in this article. The theme for the annual national conference of CLCs, 'Defining our Future: the Challenge of Change', held in August 1996, gives a flavour of the current mood.

In the 1970s CLCs developed (like their counterparts in other countries) a distinctive, alternative style of delivering legal services to the poor and disadvantaged communities. But the 1990s are vastly different from the period when CLCs first opened their doors; the political, economic and social climate has changed dramatically.

Originally CLCs were considered radical in both their form and content and were often in conflict with both governments and the legal profession. Ironically, in recent years, CLCs have been embraced by government in an attempt to solve the 'legal aid crisis' and now live in harmony with the legal profession. Government support and funding to CLCs has increased. CLCs are no longer on the fringe of the legal aid system but are considered to be an essential element of the system by both government and the legal profession. As a result CLCs in Australia are at risk of losing 'their sense of political purpose and their innovative tendencies': they are facing an identity crisis.

Even prior to the change of federal government in March 1996, there were several indicators that the rationale of CLCs was under threat. This is despite various reports and the previous Federal Government giving its seal of approval to CLCs on several occasions.[2] The decline of the welfare state, the rise of neo-conservatism and economic rationalism have altered the way government operates. More specific changes are occurring within the legal system and legal aid arena which also challenge the position of CLCs. In this article I begin to analyse what these changes might mean for the future of CLCs.

Australian community legal centres

There are currently more than 160 CLCs in Australia. They include both generalist and specialist centres. Generalist centres provide services to a local geographically defined community, and specialist centres provide services to a community defined by a common characteristic such as tenancy, welfare rights, women, mental health, credit, immigration, environment. Almost half the CLCs are specialist centres catering to groups of people with some common interest or characteristic or interest in an area of law. CLCs are supported by both the Commonwealth and most State governments.

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In 1992, Williams noted that substantial differences existed between the CLCs in various Australian States. In particular he highlighted the differences in:

- the mix of types of centres within each State — specialist, metropolitan-based generalist, or regional area-based generalist centre;
- the extent and organisation of education and reform activities; and
- the style of casework services.[3]

Williams recognised that the differences were interrelated. For example education and reform work is more easily undertaken with a clearly identifiable group. Consequently specialist centres do more of this type of work. Similarly the differences between States reflect differences in client communities and the range and availability of other legal aid and related services.

The diversity amongst centres is usually portrayed as one of the strengths of CLCs. It is justified by the need to respond to differing needs of the various communities served by CLCs. CLCs argue that they have developed an alternative and distinctive model of delivering legal services to the community. This mode of operation has been described as 'solution oriented' rather than 'services oriented'. Strategies used by CLCs include community legal education and law reform activity as well as the traditional forms of legal assistance.[4]

Current economic, political and social climate

Clearly a detailed analysis of the current political, social and legal climate is beyond the scope of this article. Instead I highlight particular aspects of significance to CLCs.

> The 'taken-for-granted' assumptions that underpinned the modern welfare state...are under attack...The neo-conservatives are more strictly laissez-faire and market oriented, and endorse an 'enterprise culture' which subordinates welfare to the rationality of market forces. It is therefore a question of private individuals securing their welfare by their own efforts. The ideology of the 'neo-conservative' New Right rejects the concept of the welfare state, takes the rhetoric of individualism literally and downplays the probable adverse social and political consequences of the 'conflictual order' it advocates.[5]

The economic, social and political framework has altered markedly since CLCs first opened their doors. The welfare state is in decline and some scholars argue that governance with a view to the 'social' is declining if not dead.

> The economy is no longer to be governed in the name of the social, nor is the economy to be the justification for the government of a whole range of other sectors in a social form. The social and the economic are now seen as antagonistic, and the former is to be fragmented in order to transform the moral and psychological obligations of economic citizenship in the direction of active self-advancement. Simultaneously, government of a whole range of previously social apparatuses is to be re-structured according to a particular image of the economic — the market. Economic government is to be de-socialized in the name of maximising the entrepreneurial comportment of the individual.[6]

Those concerned for the social and economic well-being of the poor and disadvantaged, including those involved with CLCs, need to acknowledge these fundamental shifts and assess how best to respond. In practice these changes affect not only the lives of the clients of CLCs but also the way government views and deals with CLCs.

The prevailing government policy of economic rationalism and the imperative of a balanced budget has repercussions for government expenditure and, consequently. funding of legal aid and CLCs, for example, the announcement in June 1996 that the Federal Liberal Government planned to cut $33 million from its spending on legal aid in 1997/98.

The policy of economic rationalism applies irrespective of the political persuasion of the party in power. The broad effect of this policy has been to exacerbate the gap between rich and poor in Australia: to further concentrate wealth in the hands of a few. Approximately one-half of Australia's wealth is owned by 5% of the population, 22% is concentrated in the top 1% of the population, and the bottom half of the Australian community owns less than one-tenth of the wealth.[7]

One of the features of economic rationalism is the focus on user-pays principles. This has already been applied in welfare and more recently the legal system.[8] With the current Liberal Government the principle will become more entrenched.

Recent changes to legal aid system

Since the Commonwealth Government established the Australian Legal Aid Office in 1973, there has been ongoing debate about the Commonwealth's role in the legal aid system. The innovative leadership begun under Attorney-General Lionel Murphy, was slowly whittled away during the 1970s and the States took on primary responsibility for the development of the legal aid system.

In 1987, the Commonwealth Government created a new legal aid body called the National Legal Aid Advisory Committee (NLAAC) to advise the Minister responsible for legal aid. NLAAC undertook a review of Australian legal aid, publishing a report in 1990. One of the recommendations of 'Legal Aid for the Australian Community' was that the Commonwealth Government take a more active leadership role in legal aid.[9]

In 1993 the Commonwealth Attorney-General and the Minister for Justice formed an Access to Justice Advisory Committee (AJAC). AJAC's task was 'to make recommendations for reform of the administration of the Commonwealth justice and legal system in order to enhance access to justice and render the system fairer, more efficient and more effective'. A principal task was to review and draw on the various recent Commonwealth and State reports in the justice and legal systems.

The AJAC's report, titled 'Access to Justice — an Action Plan', was published in May 1994. It covered a wide range of issues related to the legal system. In the section on legal aid it recommended that legal aid should be more broadly based than just financial assistance for legal representation.

> Legal aid should include such services as telephone advice schemes (incorporating skilled interpreters where necessary), training for community and social welfare groups, and community education programs. [p.xxxvii]

In relation to the role of the Commonwealth it said:

> the Commonwealth has and should have a clear responsibility, as the major funder of legal aid to ensure that legal aid provision operates efficiently and effectively and in accordance with the objective of national equity. [p.238]

The Justice Statement

In May 1995, the then Commonwealth Government released the Justice Statement. This was the Government's response to the AJAC report and it contained strategies to be adopted by the Commonwealth Government in relation to a range of issues affecting access to justice. In particular, the introduction to the Justice Statement states:

> The Commonwealth will also assert its proper role and authority as the major provider of legal aid funding. It will ensure that community needs regarding legal assistance are addressed fairly and efficiently, and that legal aid policies and priorities are oriented properly to meet community expectations. [pp.1,4]

The Justice Statement indicated that funding for legal aid was to increase by $68.7 million over a four-year period nationally.[10] Funding was provided for more services in civil and family law and more legal advice that is not means tested.

Following the Justice Statement the Government established a non-statutory body, the Australian Legal Assistance Board (ALAB) to pursue a national approach to the delivery of legal aid. Unlike its predecessor, NLAAC, ALAB has no members from the private profession nor from CLCs.

Victoria Legal Aid

In the same month the Justice Statement was released, the Victorian State Attorney-General, introduced the *Legal Aid Commission (Amendment) Bill* into Parliament. Part One of the *Legal Aid Commission (Amendment) Act* came into effect on 14 June 1995, with the remaining substantial part of the Act coming into effect on 14 December 1995. The Act turned the Legal Aid Commission of Victoria (LACV), an independent statutory body, into Victoria Legal Aid (VLA), a 'new and more business like corporate body'.[11]

The VLA five-member board of directors is constituted solely on the nominations of the State (3) and Commonwealth (2) Attorneys-General. Unlike its predecessor, the LACV, there are no nominees from the legal profession, community legal centres, salaried legal aid staff, the Council for Social Services or the community.

As a result, the management of legal aid in Victoria altered radically. The previous system relied on a partnership between various sections of the legal profession, the community and both State and Commonwealth Governments. The new legislation creates a legal aid system in which there is little opportunity for input from either users of the system or providers of the legal services.

Commonwealth support for the abolition of the LACV by the *Legal Aid Commission (Amendment) Act* signals a significant policy shift in the way the Commonwealth Government wants the Australian legal aid system to operate.[12] This is a policy change that does not rate a mention in the Justice Statement and appears inconsistent with other policies in that statement, especially the sentiment that the Commonwealth will ensure that community needs for legal assistance are addressed fairly and efficiently, and that legal aid policies and priorities are oriented properly to meet community expectations. The Statement provides no detail on how the Commonwealth intends to implement this aim, but without genuine input from the legal profession, community legal centres, users of legal aid and staff of VLA, the VLA and the Commonwealth cannot ensure that community needs are met.

The change in the Victorian legal aid body indicates the trend for legal aid nationally. It is most unlikely that the new Liberal Federal Government will revert to a more consultative format.

Whatever the structure of legal aid, it seems certain that the trends to privatisation and user-pays in the provision of government services will transform the way legal aid is delivered. Already in Victoria there is a compulsory contribution for people granted legal aid and franchising is being piloted.[13]

CLCs funding program

Most CLCs are funded through a combination of both State and Commonwealth CLC funding programs. The Commonwealth funding for CLCs reflects the developments in the broader legal aid system. Up until 1996 the number of CLCs has increased each year. In 1993/94, $10,808,000 was allocated to fund 94 centres around Australia. The Commonwealth contribution was 74%. Only one State contributed more than the Commonwealth and in three States, there was no contribution at all to the funding of CLCs.

In the Justice Statement, CLCs received substantial additional funding. This was used to expand the network of generalist (nine new centres) and specialist community legal centres. There was also a substantial injection of funds to the Women's Legal Resources Group to extend its services to rural women and aboriginal women in particular.[14]

Implementation of the Justice Statement came to a halt with the announcement of an election in March 1996. The August budget phased out Justice Statement moneys to legal aid commissions but continued funding to CLCs. The implications for CLCs of the funding cuts to legal aid commissions is not clear at the time of writing.

Changes to CLC funding process and service agreements

Until recently the State legal aid commissions were solely responsible for administering both the State and Commonwealth CLC funding programs. This situation recently changed with the distribution of the Justice Statement moneys. The Commonwealth ignored or did not seek the assistance of the legal aid commissions. The Commonwealth sought submissions and allocated funds without referring to the current funding guidelines or any published criteria.

The Commonwealth is preparing a National Funding and Performance Agreement('Service Agreement'), in particular for signing by those centres funded under the Justice Statement, with a view to having all CLCs sign for the 1997 financial year. Although CLCs recognise the need for appropriate service agreements and accountability, various concerns have been expressed by the National Association of Community Legal Centres (NACLC). These include that the agreements are fundamentally flawed and lack clarity. The role of the Commonwealth in the management of the CLC funding program is unclear.[15] However the Commonwealth is pushing ahead requiring CLCs to sign.

Consequences of changes for CLCs

Economic rationalism and the threat to 'community'

In the *Study of Four Centres* the common features were said to include:

> Each CLC has developed in response to communities that sought to fill a gap in unmet legal need in their community. Each Centre's development has been dependent on a number of factors including the persistent commitment and activism of their community, the particular needs of that community, the prevailing political climate and the availability of resources.[16]

This indicates the emphasis placed on the importance of 'community' in the development of CLCs. Links with a 'community' are stressed as imperative. The fact that CLCs respond to communities rather than being inflicted on communities is perceived as relevant.

The concept of community was an essential element of the original ideology underlining the opening of the Fitzroy Legal Service (FLS) in 1972. It has been argued that Fitzroy Legal Service was the manifestation of 'New Left' politics in the legal arena.[17] A common thread through the New Left approach was a focus on community participation and control. FLS was used as a model for other centres both within Victoria and in other States. The commitment to community participation as espoused by FLS was endorsed in the 'Law and Poverty Report' of the Commission of Inquiry into Poverty in 1975.

Community participation is still presented by CLCs as central to their mode of operation. As recently as May 1995, the rhetoric was adopted by the then Commonwealth Government in its Justice Statement:

> The Government recognises that community legal centres' close links to their communities are an important part of their effectiveness and accessibility and will continue to support and foster this fundamental characteristic through encouraging community participation and development. [p.109]

However, given the new ideological force within which CLCs have to operate, CLCs need to reflect on the concept of 'community' and what it means to their mode of operation.

Previously a CLC would only receive government funding after proving local support and involvement by operating as a voluntary service for a substantial period of time. Recently the Commonwealth Government has decided that a particular town or area should have a CLC, allocated funds and then sought community involvement. This represents a significant change in the importance the Commonwealth Government places on community participation in the development of CLCs.

Whilst the Commonwealth Government endorses community participation and involvement in CLCs it is increasingly focusing on the 'legal aid services it can purchase'. It is irrelevant what sort of organisation provides the service. In order to compete, CLCs need to analyse and present the benefits of community participation in economic terms.

As the economic imperative of the market takes hold in the legal aid arena, CLCs will have to compete with the private profession to provide services, particularly as the National Competition Strategy is applied to the legal profession.[18] A local private practitioner could compete to provide legal aid services to a geographic area. More disturbingly, CLCs will compete against other CLCs or welfare organisations. The basis of the CLC community involvement may well be undermined.

When discussing the implications of the application of competition principles to the legal profession to access to justice issues and legal aid services, Sackville said:

> The fundamental policy question is how best to allocate scarce public resources to assist most effectively those who cannot afford to purchase legal services in the marketplace...The [competition] principles will be important in creating a condition in which the legal aid agency can obtain legal services at the lowest cost to itself and to the community. But the major point is that in these contexts questions of equity loom larger than market considerations.[19]

The challenge for CLCs is how to keep the question of equity at the forefront of decisions in legal aid policy.

Equally, as the neo-conservative approach prevails, the Government will no longer countenance CLCs acting in the 'community's' interest to achieve improvements to the 'social' well-being of the poor and disadvantaged. This type of governmental policy shift fundamentally attacks the rationale of CLCs as they exist today.

Funding program and loss of control and independence

A major concern arising from the changes in the funding arrangements for CLCs is the increasing intervention of the Commonwealth Government to the detriment of State-based legal aid commissions. With this development, the control of the funding program becomes centralised. The funding program will be administered by an isolated bureaucracy which is concerned with counting outputs rather than promoting and planning efficient ways of addressing the legal needs of the poor.[20]

In commenting on the diversity of CLCs amongst the States, Williams concluded that:

> attempts at planning on a national basis, would impact not just on the particular centres concerned, but will have effects on the complex relationships that have developed between centres at a State level...It strikes at the heart of the community basis of the legal centre movement, and is another example of governments' general inability to accept that communities can make rational planning decisions about their need for services. [p.294]

The draft service agreements are an illustration of these concerns. They concentrate on outputs and increased reporting requirements without setting out the responsibilities of the State commissions or the Commonwealth.

These developments are a threat to the independence of CLCs and an attempt to limit the type and style of work centres engage in. Previously the Commonwealth Government has not sought to exert this level of influence although they required certain financial and statistical reports. The new service agreement is the instrument which will be used to exert this control.

Further, if the services that the Government wishes to purchase from CLCs are traditional legal services, than the financial viability of CLCs in their current form is threatened. As Basten predicted in 1980, increasingly CLCs will have to fight to maintain their unique approach to providing legal services to the poor and disadvantaged.

Legal aid system and loss of influence

As referred to above, the preferred option in management structures for the Commonwealth Government is smaller, 'more corporate like' legal aid commissions. The new national body NLAB and the new State body VLA are examples of this approach. The bodies exclude direct input from CLCs as well as other interested parties. This is a significant change from the recognition of the CLC contribution by legal aid policy makers since the mid-1970s and reflects a possible decline in their influence.

CLCs no longer have direct input into decisions made about the broader legal aid system. As a consequence they are not able to represent the views of those who use their services. In particular, they do not have the direct opportunity to advise on the practical results of certain policy decisions. Additionally, with the loss of direct input into legal aid bodies, the innovations in the delivery of legal services

developed by CLCs will take longer to penetrate the broader delivery of legal aid services. Nonetheless, CLCs have mounted a significant campaign against the cuts to legal aid funding.

Conclusion

In light of the decline of the welfare state, the rise of neo-conservatism, changes to the legal aid system, the legal profession and the economic imperative of market forces in the way government operates, it is not surprising that CLCs are facing an identity crisis. Much of the underpinning philosophy of CLCs has been aimed at improving 'the social': enhancing the lot of the disadvantaged and poor. Some theorists argue that with the decline in the welfare state there has been a 'death of the social'.

A new analysis of the aims of CLCs, the role of 'community' in the CLCs mode of operation and the mode of operation itself is warranted. This task will be difficult and possibly divisive amongst CLCs within the current threatening environment. But unless it occurs quickly, there is a real risk that CLCs will have 'their sense of political purpose and their innovative tendencies' trampled on and as a result the senility Basten feared may set in.

References

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3. Williams, K., 'Legal Centtres Across Australia' (1992) 17(6) *Alt.LJ* 293.
4. National Legal Aid Advisory Committee, *Legal Aid for the Australian Community*, AGPS, 1992, p.126.
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6. Rose, N., 'The Death of the Social? Re-figuring the Territory of Government' (1996) 25(3) *Economy and Society.*
7. See Saunders, P., *Welfare and Inequality,* Cambridge University Press, 1994.
8. Thorne, E., *Broad Factors Affecting Legal Aid in the 90s: Economic Factors*, Paper given at National Legal Aid Conference Legal Aid — Legal Access, Sydney, February, 1992.
9. NLAAC report p.63 and the Access to Justice report para 9.37 endorsed this view.
10. In 1994, the Law Council of Australia estimated that to restore legal aid funding to those who were eligible in 1987/88 (the benchmark for current funding arrangements) there would need to be an increase of funding of $50 million per annum nationally.
11. *Legal Aid Commission (Amendment) Bill 1995*, Second Reading Speech, 3 May 1995, p.4.
12. Similar legislation was proposed in New South Wales in 1994 but was never passed after extensive lobbying by community legal centres opposing the changes.
13. A $30 compulsory contribution was introduced in 1992. The first Australian franchise of legal aid services was piloted in December 1994. See Legal Aid Commission of Victoria, *16th Statutory Annual Report 1994-1995,* p.24. For a detailed discussion of the issues in franchising see Giddings, J., *Franchising Arrangements and the Quality of Legal Aid Services,* unpublished M LLB thesis, 1995.
14. For a detailed account of the results of the Justice Statement and CLCs see *CLC Notebook — Newsletter of the National Association of Community Legal Centres,* Issue 3, May 1996, p.13.
15. See *CLC Notebook -Special Bulletin,* May 1996, p.1.
16. Office of Legal Aid and Family Services, 'Community Legal Centres — A Study of Four Centres in New South Wales and Victoria', AGPS Canberra, 1991.
17. Chesterman, J., *Poverty Law and Social Change — The Story of the Fitzroy Legal Service,* Melbourne University Press,1996.
18. Report by the Independent Committee of Inquiry, *National Competition Policy*, 1993 (the Hilmer report); Trade Practices Commission, *Study of the Profession — Legal*, Final Report, 1994.
19. Access to Justice Advisory Committee, *Access to Justice — An Action Plan* Canberra, 1994, p.14.
20. For a discussion of how community legal clinics in Ontario, Canada suffered from interference and control by the funding body see Blazer, M., 'The Community Legal Clinic Movement in Ontario: Practice and Theory, Means and Ends' (1991) 7 *J of Law and Social Policy* 49.

Groves article continued from p.6.

extension of LPP to unrepresented people along the lines of s.120 of the *Evidence Act* (Cth and NSW)); second, specific legislative measures to prevent, or control, the behaviour of custodial staff in respect of any documents held by accused people; third, detailed administrative guidelines designed for custodial staff.

References

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2. See, for example, *McEvoy v Lobban* (1988) 35 A Crim R 68, 71 (Carter J, Qld Sup Ct); *Kuczynski* (1994) 72 A Crim R 568, 589 (Owen J, WA Sup Ct) and *Coco v R* (1994) 179 CLR 427, 436 (Mason CJ, Brennan, Gaudron and McHugh JJ).
3. ALRC, *Evidence — Interim Report, Vol 1,* Report no.26, 1985, paras 112, 444.
4. Aronson, M. I. and Hunter, J., *Litigation — Evidence and Procedure* 5th edn, Butterworths, 1995 at 491-2.
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6. McNicol, above, pp.80-1.
7. See also *McKinney v R* (1991) 171 CLR 468, 478 where Mason CJ, Deane, Gaudron and McHugh JJ emphasised that the concept of fairness in this context is both variable and normative.
8. *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ), 57-8 (Deane J). See also *McKinney v R* (1991) above, at 478 (Mason CJ, Deane, Gaudron and McHugh JJ).
9. See generally *McKinney v R* (1991) above.

Postscript

By amendments passed in late 1996, these powers have effectively been transferred to the *Corrections Act* 1986 (Vic.) ss.104A-D. The amendments, not yet commenced, introduce some important changes. The amendments extend police powers of search and seizure to *all* people held in police gaols, irrespective of whether they have been charged with an offence (s.104A). They also enable the police to conduct a 'formal search', using a hand-held metal detector, presumably to find weapons on anyone who wishes to enter or remain in a police gaol. A person who refuses to be searched cannot enter or remain in the police gaol (s.104B). Under the new provisions the grounds on which prisoners may be serached, and property seized, are otherwise similar to those in existing legislation (s.104C). As with the existing regulations, these provisions make no specific reference to lawyers or legal documents. Accordingly, it is not clear whether they are intended to cover any legal documents held by, or passed to, a person held in police custody. However, the general language of the provisions indicates that they appear to be designed to find weapons and evidence.